

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI**

*In the Māori Land Court of New Zealand
Waiariki District*

AP-20230000030042

WĀHANGA <i>Under</i>	Sections 113, 117, 214 and 219, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Succession and Constitute a Whānau Trust – Te Poroa Joseph (Joe) Malcolm
NĀ <i>By</i>	EVA RANGIKAHIWA MOKE AND MARGARET MAKARITA HAHIPENE Ngā kaitono <i>Applicants</i>

Nohoanga:
Hearing

4 May 2025, 333 Waiariki MB 74-97
5 December 2024, 328 Waiariki MB 249-250
27 February 2024, 320 Waiariki MB 254-272
15 November 2023, 310 Waiariki MB 87-125
4 August 2023, 301 Waiariki MB 76-82
4 August 2023, 301 Waiariki MB 64-75
(Heard at Rotorua)

Kanohi kitea:
Appearances

J McDougall and S Blyth-Nepia for First and Second Applicants
M McKechnie for Third Applicant

Whakataunga:
Judgment date

5 June 2025

TE WHAKATAUNGA Ā KAIWHAKAWĀ T M WARA
Judgment of Judge T M Wara

*Ngā taipitopito kēhi e toe ana
Proceedings continued*

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Ngā taipitopito kēhi e toe ana
Proceedings continued

AP-20230000025080

MŌ TE TAKE
In the matter of

Succession and Constitute a Whānau Trust - Grace
Ritohou Malcolm also known as Grace Ritohou
Heremaia

NĀ
By

MARGARET MAKARITA HAHIPENE AND
EVA RANGIKAHIWA MOKE
Ngā kaitono
Applicants

AP-20230000024977

MŌ TE TAKE
In the matter of

Succession and Constitute a Whānau Trust –
Joseph Poroa Malcolm also known as Joseph Te
Poroa Malcolm

NĀ
By

ANGELA MALCOLM, GRACE MALCOLM
AND ANDREW MALCOLM
Ngā kaitono
Applicants

Hei tīmatanga kōrero

Introduction

[1] This decision concerns Ngā Ōhākī Whānau Trust, and the terms to be contained in the trust order.

[2] There are two applications before the Court concerning the constitution of a whānau trust, with Māori land interests of Joseph Te Pōroa Malcolm (Te Pōroa) and Grace Ritihou Malcolm (Grace).

[3] On 27 February 2024 orders of transmission were granted, vesting the Māori land interests of both Te Pōroa and Grace in the administrators of their estates, so that those interests can be vested in a whānau trust in accordance with their respective wills.

[4] At the hearing, the proposed trustees were deemed suitable, and the application for the constitution of a whānau trust was adjourned to chambers, where I had intended to grant an order from Chambers following a whānau meeting to confirm the terms of trust.

[5] Between March 2024 and May 2024, a series of whānau meetings were held to consider and discuss terms of Ngā Ōhākī Whānau Trust. Unfortunately, no agreement was reached, and the application returned to Court for final determination.

Te ture

The law

[6] While the Court has extensive supervisory powers in relation to trusts, the Court is guided by the views of the beneficial owners as to the appropriateness of the terms, and care should be taken to ensure that the terms of trust are relevant to the particular trust. Whenever a new trust is established, the Court must approve a trust order setting out the terms of the trust.¹

[7] Section 214 of Te Ture Whenua Māori Act sets out the specific requirements for a whānau trust, and there are two key terms. First, the purpose of a whānau trust is for promoting health, social, cultural and economic welfare, education and vocational training, and general advancement in life of the descendants of any tipuna named in the order: s

¹ Te Ture Whenua Māori Act, s 219.

214(3). Second, the beneficiaries of the whānau trust are those beneficially entitled at the time the whānau trust is constituted, and their descendants: s 214(5)(a).

[8] Rule 12.1 provides that an application for the constitution of a trust constituted under Part 12 of the Act, including a whānau trust, must be accompanied by meeting minutes including a list of people who attended the meeting; a list of people who voted for or against the proposed trust; and a statement as to notice for the meetings. This evidence is required so that the Court can assess the level of support amongst the beneficiaries for any proposed terms.

[9] I take these factors into account when determining the terms of Ngā Ōhākī Whānau Trust.

Kōrerorero

Discussion

[10] At the hui whānau of 16 March 2024, an agreement was reached amongst the whānau as to the majority of the terms, however there was a dispute as to the concept of Kāwai and how it is applied to representation and participation within the trust.

[11] “Kāwai” provides a representational basis for Te Pōroa and Grace’s descendants. In accordance with clause 3.4 of the proposed terms of trust there are seven Kāwai:

Kāwai refers to the descent group from each line(s) of the tūpuna as follows:

- (a) **Margaret Makarita Hahipene** and her biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;
- (b) **Eva Rangikahiwa Moke** and her biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;
- (c) **Andrew Pehea Malcom** and his biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;
- (d) **Richard Rihari Malcom** and his biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;
- (e) **Grace Riria Malcolm** and her biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;
- (f) **Angela Ritohou Malcolm** and her biological descendants including whāngai and children legally adopted from the tūpuna lines of descent;

- (g) **Keepa Malcolm; Shane Erua Heremaia and Rawiri Ronald Charles Heremaia** and their biological descendants including whāngai and children legally adopted from the tūpuna lines of descent.

[12] Under the proposed terms, the Kāwai holds the responsibility and authority for a number of matters including the selection of trustees; and participation and voting at any meeting:

- (a) each Kāwai will appoint one trustee to be confirmed at an Annual General or Special meeting of Beneficiaries (clause 3.5);
- (b) Where voting is required at any Annual General or Special meeting of Beneficiaries, each Kāwai only has one vote (clause 5.9(a));
- (c) A vote is carried when at least four of Ngā Kāwai Tokowhitu are in agreement (clause 5.9(d));
- (d) Any Kāwai are permitted to cast a vote in writing – however if more than one vote is received from any Kāwai all votes (from that line) are disqualified (clause 5.10); and
- (e) Where a variation of terms is sought, there must be a sufficient level of support for the variation amongst Ngā Kāwai Tokowhitu (clause 8.2).

[13] The Kāwai membership has been set out in the evidence, which records that there are 28 beneficiaries over the age of 18 from each Kāwai as follows:

<u>Kāwai</u>	<u>Beneficiaries</u>	<u>No of Beneficiaries</u>
Margaret	Margaret; Pomare and Kahukura	3
Rangikahiwa	Hiwa; Keita; Hirata; Ihaka; Tikao and Tumu	6
Andrew	Andrew; Iwi; Tana; Raiha and Totorewa	5
Richard	Mutu	1
Grace	Grace	1

Angela	Angela and Rongo	2
Adopted whānau	Keepa; Brienah; Jesse; Jay; Dayna; Shane; Rawiri; Huia; Huruaio	10

[14] Eight hui whānau were held between 16 March and 12 May 2024 to consider and discuss the terms of trust. At the first meeting, key terms of trust were agreed, however the use of Kāwai continued to be an issue that was discussed through the subsequent six meetings. At the final meeting of 12 May 2024, a resolution was passed in relation to the voting process, and the use of Kāwai to vote at all meetings, including Annual General or Special meeting of Beneficiaries. However, I note that there were only ten whānau present at the time the vote was cast, as both Hiwa and Margaret had left the meeting before the vote. The evidence is that this resolution was supported by 35% of the beneficiaries over the ages of 18 years.

[15] Although it is not unusual, particularly within Te Arawa, for trustees to be selected to represent koromatua lines, or lines of descent, these proposed terms go one step further. Not only is this the process for the selection of trustee representatives, it is also the process for voting at all meetings, limiting the way in which the beneficiaries can participate in meetings of the beneficiaries, as there can only be one vote for each Kāwai.

[16] The use of a Kāwai model for expressing the views of beneficiaries also creates some difficulties where, under Part 12 of the Act, there are circumstances where the Court must take into account the views of the beneficiaries. For instance, under s 222 of the Act the Court cannot appoint a trustee unless it is satisfied that the appointment is broadly acceptable to the beneficiaries. Under s 241 of the Act in relation to a termination of trust, the Court must take into account a range of important considerations including the extent of beneficiary and trustee consent; and the impact of any termination on the remaining beneficiaries and the trust.² Finally, where a variation of terms is sought under s 244, the Court cannot exercise its powers unless satisfied that there is a sufficient degree of support for the variation amongst beneficiaries.

² *Larkins v Kataia – Waihou Hutoia D2A Block* [2013] Māori Appellate Court MB 159 (2013 APPEAL 159) at [19] – [28].

[17] Taking into account both the level of support, and the difficulty in taking into account the views of beneficiaries when only Kāwai can vote, I will not accept a term where only Kāwai can vote at Annual General or Special meeting of Beneficiaries, as this creates a barrier to beneficiary participation. However, as there is a clear and consistent level of support for each Kāwai to appoint a trustee, this will be reflected in the terms of trust.

Ngā takitaki o te taratī

Terms of the trust

[18] In accordance with s 219 of the Act, the court approves the fifth version of the proposed terms of trust for Ngā Ōhākī Whānau Trust, with the following amendments:

- (a) Clause 2.2 – replace “*for decision by Ngā Kāwai Tokowhitu*” with “*for decision by the Beneficiaries.*”
- (b) Clause 4.18 - replace sub clauses (f) “*and decided upon by Ngā Kāwai Tokowhitu*” with “*and decided upon by the Beneficiaries.*”
- (c) Clause 5.9 – replace sub clauses (a) to (d) with “*voting is by show of hands of the Beneficiaries who are present, and over the age of 18 years.*”
- (d) Clause 5.10 – delete.
- (e) Clause 5.12 – replace “*four trustees*” with “*a majority of trustees.*”
- (f) Clause 5.12 – replace “*When at least four trustees are in agreement*” with “*by majority.*”
- (g) Clause 8.2 – replace sub clause (b) with “*there is a sufficient degree of support for the variation among the Beneficiaries.*”
- (h) Clause 8.6 – remove “*but shall not be eligible to vote on any matter.*”

Te Kupu Whakatau

Decision

[19] In accordance with sections 214 and 219 an order is granted constituting the Ngā Ōhākī Whānau Trust and declaring the terms of trust with the draft trust order, now approved by the Court, subject to the amendments listed at para [18]. The Tūpuna are Joseph Te Pōroa

Poroa Malcolm and Grace Ritihou Malcolm, and the trust is for the benefit of all the descendants of the Tūpuna.

I whakapuaki i te 10:00am i Rotorua, tuarima o ngā rā o Hune i te tau 2025.
Pronounced at 4:00pm in Rotorua on this 5th day of June 2025.

T M Wara
KAIWHAKAWĀ